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No. 82-317

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JAMES KNIGHT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. IS IT PROPER TO PERMIT A KEY GOVERNMENT WITNESS TO TESTIFY TO THE OUT-OF-COURT DECLARATIONS OF CO-CONSPIRATORS UNDER THE CO-CONSPIRATOR EXCEPTION TO THE DEFINITION OF HEARSAY, *FEDERAL RULES OF EVIDENCE 801 (d) (2) (E)*, PRIOR TO PRESENTATION OF ANY INDEPENDENT EVIDENCE THAT A CONSPIRACY EXISTED OR THE MEMBERSHIP OF THAT CONSPIRACY?

II. DOES AN ACTUAL CONFLICT OF INTEREST BETWEEN A DEFENDANT AND HIS COUNSEL EXIST WHERE IT IS SHOWN THAT, AT THE TIME OF TRIAL, THE DEFENDANT AND HIS ATTORNEYS WERE JOINTLY UNDER ACTIVE INVESTIGATION FOR POSSIBLE VIOLATIONS OF FEDERAL CRIMINAL LAW AND POTENTIAL CONTEMPT OF COURT ARISING FROM THE ATTORNEYS' POSSESSION, TRANSFER, AND DESTRUCTION OF THE GOVERNMENT'S TRIAL OUTLINE AND A GRAND JURY TRANSCRIPT AND THE DEFENDANT, WHO WAS A POTENTIAL GOVERNMENT WITNESS AGAINST HIS ATTORNEYS, WAS NEVER INFORMED OF NOR ENTERED A WAIVER OF THE RIGHT TO INDEPENDENT COUNSEL?

PARTIES TO THE PROCEEDINGS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

PLAINTIFF:

UNITED STATES OF AMERICA

DEFENDANTS:

EUGENE MASON ALLEY
ROBERT "BOBBY" TAYLOR
JAMES KNIGHT
WAYNE DREWRY
VERNON MAHANA

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Exhibit D 15a
Opinion of the United States Court of Appeals for the Sixth Circuit filed on June 22, 1982.

Exhibit E 17a
Relevant portions of the Transcript of Proceedings at the trial of this case in the United States District Court for the Eastern District of Kentucky.

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No. .....

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES KNIGHT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, James Knight, by his counsel, prays that a Writ of Certiorari issue to review the Judgments and Orders of the United States Court of Appeals for the Sixth Circuit entered in this case on August 12, 1981, and June 22, 1982.

OPINIONS BELOW

No written Opinion regarding the first issue in this case was filed or published by the United States District Court for the Eastern District of Kentucky. The oral ruling of

the Court is at Pages 19a, 20a of the Appendix to this Petition. The Memorandum Opinion of the United States District Court for the Eastern District of Kentucky following remand is at Pages 4a-11a of the Appendix to this Petition and has not been officially reported to date. The Opinions of the United States Court of Appeals for the Sixth Circuit affirming the Judgment of the District Court are at Pages 12a-15a and Pages 15a-17a of the Appendix to this Petition and have not been officially reported to date.

JURISDICTIONAL STATEMENT

The date of the Judgment of the Court of Appeals for the Sixth Circuit and the date of its entry is June 22, 1982. (App. 15a) Jurisdiction of this Court is invoked under *28 U.S.C. § 1254(i).*

CONSTITUTIONAL PROVISIONS AND FEDERAL RULES OF EVIDENCE

AMENDMENT SIX:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him, . . . and to have the assistance of counsel for his defense."

RULE 104 (a):

> "Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the Court, subject to the provisions of Subsection (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges."

RULE 104 (b) :

> "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon or subject to the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

RULE 801 (d) (2) (E) :

> "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

STATEMENT OF THE CASE

Petitioner and four others were indicted in the Eastern District of Kentucky for conspiracy, mail fraud, wire fraud, and interstate transportation of stolen property *(18 U.S.C. §§ 371, 1341, 1343, 2314)*. The charges arose out of a series of four business transactions in which the Defendants allegedly defrauded finance and leasing companies by purchasing encumbered mining equipment and then reselling that equipment without notification to the buyers of the interests of the finance or leasing companies. On March 5, 1980, a jury found Petitioner guilty of conspiracy and of the substantive counts relating to two of the transactions, those involving the High Carbon Coal Company and the J & S Coal Compay. On March 19, 1980, Petitioner was sentenced to five years imprisonment and fined $10,000.00 on the conspiracy count. Sentencing on the substantive counts was suspended and the Petitioner was placed on probation for a five year period commencing upon his release from incarceration.

The Government's case rested primarily on the immunized testimony of J. R. Durham, the self-admitted mas-

termind and prime mover in these transactions, and the testimony of Vernon Mahana, an indicted Defendant who had fronted the transfers of equipment in three of the transactions. The major portion of both men's testimony related to hearsay in the form of conversations with and statements made by James Knight's Co-Defendants, all of which were held, over objection, to be admissible against the Petitioner under *Fed.R.Evid 801(d)(2)(E)*, the co-conspirator exception. Under the ruling by the Sixth Circuit in *United States* v. *Vinson*, 606 F.2d 149 (1979), all of this hearsay evidence was allowed to be admitted prior to any findings by the Court that a conspiracy existed of which the out of court declarant and the Defendant were members and that the statements were made in furtherance of and during the course of that conspiracy. Under *Vinson*, the Trial Court was permitted to wait until the close of the Government's case to make general findings of these facts without any statement of the evidence used or not used in support of those findings. Under *Vinson*, the Trial Court was also permitted to use the hearsay communications themselves as the basis for these findings.

Outside of the evidence admitted under *801(d)(2)(E)*, the only evidence connecting Petitioner to the High Carbon Coal Company transaction was proof that he, as an independent equipment hauler, had hauled encumbered equipment from the High Carbon mining site and had been compensated for his services. With regard to the J & S Coal Company transaction, the non-hearsay proof consisted of showing that Knight was the ultimate recipient of three pieces of encumbered mining equipment and that he had, apparently, traded his ownership of a racetrack to two of the Co-Defendants in exchange for them.

Prior to the commencement of trial, the Assistant U.S. Attorney prosecuting the case, Robert Trevey, discovered

that the Grand Jury Transcript of J. R. Durham and the Government's trial outline were missing from his briefcase. Petitioner's retained attorneys, W. L. Rose and Gary Crabtree, came into possession of the papers and, after reviewing them, transferred them to Thomas Fowler, the Attorney for Wayne Drewry, a Co-Defendant. Fowler and Drewery were staying in Petitioner's home and, while Knight was driving them there, the three men stopped and allowed another Co-Defendant, Eugene Alley, to copy the Grand Jury Transcript. The next day a Search Warrant was executed on Alley's office and his copy of the Transcript was seized. Alley and his wife were arrested for possession of stolen government property. The U.S. Attorney's Office, through Trevey, and the F.B.I. initiated an investigation. On the night of Alley's arrest, Knight's Attorney, W. L. Rose, phoned Attorney Fowler at Knight's home and told Fowler to destroy the originals, which Fowler did. Knight, who is illiterate and never had possession of the papers, was a witness to these events. In the intervening five days before trial, the Government investigation focused increasingly on the Petitioner, his two Attorneys, and Attorney Fowler. Rose, who had falsely denied his possession of the papers when questioned by Assistant U.S. Attorney Trevey, told Knight that they all could get charged and that the Attorneys could lose their licenses. When the Prosecutor sought to interview Knight regarding the papers during the trial, Rose, acting as Knight's counsel, instructed Petitioner to take the Fifth Amendment. However, after Alley gave a complete statement to the Government, Petitioner's Attorneys both changed their stories and admitted possession of the original documents (but not their destruction or theft).

The Trial Court was made aware of the active investigation of certain Defendants and their Attorneys but de-

cided to proceed with the trial and to set the matter of the Government documents aside until its completion. The Petitioner was never informed of his right to independent counsel nor did he enter any waiver of that right. Immediately upon receiving a verdict, the Court Ordered the U.S. Attorney's Office to investigate and report on whether there was any theft of Government property or contempt of Court by Petitioner's Attorneys. This report was received by the Court on the date of Petitioner's sentencing and subsequently an opinion was issued finding the Attorneys' conduct reprehensible but not sufficient grounds for contempt or further charges (Neither the Court nor the U.S. had learned of Rose and Fowler's destruction of the papers).

After the Sixth Circuit remanded the Petitioner's case to the District Court for further investigation into potential conflict, the full sequence of events was set forth in a series of hearings and made into findings by the Trial Court (App. 4a-11a). The District Court concluded that these facts did not show an actual conflict of interest and that, even if it did, Knight was not prejudiced by the conflict (App. 4a). This decision was affirmed by the Sixth Circuit (App. 15a-17a).

ISSUE ONE

A. SPLIT AMONG COURTS OF APPEALS PRESENTED:

The United States Circuit Courts of Appeal are in conflict regarding the appropriate method by which to admit testimony under the exception from the definition of hearsay for co-conspirator's statements found in *Federal Rules of Evidence 801(d)(2)(E)*. The Supreme Court

Opinions addressing this issue pre-date the *Federal Rules of Evidence*. *United States* v. *Nixon*, 418 U.S. 683, 701, n.14 (1974); *Glasser* v. *United States*, 315 U.S. 60 (1942). The United States Court of Appeals for the Sixth Circuit is at odds with most of the other circuits on the issue presented by this case. The conflict among the circuits is posed precisely by the case presently before the Court.

The co-conspirator exception to the definition of hearsay allows out-of-court statements to be admitted into evidence if, at the time the statement was made, a conspiracy existed, the out-of-court declarant and the defendant were members of the conspiracy, and the statement was made in furtherance of the conspiracy. *Fed. R. Evid. 801(d)(2)(E)*. The disagreement among the circuit courts is two-fold:

1) Most of the circuit courts require that the admissibility of the hearsay testimony be determined on the basis of evidence other than the hearsay itself. *Compare, United States* v. *Stipe*, 653 F.2d 446, 448 (10th Cir., 1981); *United States* v. *Alvarez-Porras*, 643 F.2d 54 (2nd Cir., 1981), *cert. denied*, 102 S.C. 146 (1981); *United States* v. *James*, 590 F.2d 575, 579 (6th Cir., 1979) (en banc), *cert. denied*, 442 U.S. 917 (1979); *United States* v. *Macklin*, 573 F.2d 1046 (8th Cir., 1978), *cert. denied*, 439 U.S. 852 (1978), and *United States* v. *Snow*, 521 F.2d 730, 733 (9th Cir., 1975), *cert. denied*, 423 U.S. 1090 (1976) with *United States* v. *Vinson*, 606 F.2d 149, 155 (6th Cir., 1979) and *United States* v. *Martorano*, 557 F.2d 1, 12 (1st Cir., 1977), *cert. denied*, 435 U.S. 922 (1978).

2) The Courts of Appeal also diverge on whether to require proof of the conspiracy prior to admission of the hearsay. *Compare, Stipe*, 653 F.2d at 448 and *James*, 590 F.2d at 581 with *Vinson*, 606 F.2d at 154.

This split among the circuits is presented precisely in this case because: (1) the trial court admitted co-conspirator

hearsay testimony prior to admission of any other evidence; (2) the trial court relied upon the hearsay itself in making the determination to admit the testimony without admonition to the jury at the end of the government's case; and (3) the only evidence, other than the hearsay against Petitioner, was as consistent with innocence as with guilt. The United States Attorney exploited the defective *Vinson* holding to its greatest extent by putting on the mastermind and kingpin of the alleged conspiracy as the first witness in the case. Since *Vinson* was the controlling opinion in Petitioner's case, the kingpin of the conspiracy was allowed to testify regarding statements of third parties alleged to be members of the conspiracy prior to any independent evidence that a conspiracy existed or that Petitioner was a conspirator.

B. SIXTH AND FIRST CIRCUIT RULES ARE DEFECTIVE:

1. Consideration Of Hearsay In Determination Of Its Admissibility Contradicts Supreme Court Opinions And Other Courts Of Appeal.

The Supreme Court has twice held that proof of the necessary foundation for admission of hearsay under the co-conspirator exception must come from evidence other than the hearsay itself. *United States* v. *Nixon,* 418 U.S. 683, 701, n.14 (1974); *Glasser* v. *United States,* 315 U.S. 60, 74-75 (1942). The rationale of these cases is inescapable — if hearsay is inherently unreliable, then it cannot, of itself, justify being excepted from the general rule excluding hearsay; that is to say, inherently incompetent evidence cannot pull itself up to the level of competence by its own bootstraps. *Glasser,* 315 U.S. at 74-75.

As pointed out above, the Sixth Circuit has rejected the *Glasser - Nixon* holdings on this point.

Petitioner was convicted on the basis of hearsay testimony admitted under the exception presently being discussed and on the basis of the fact that he helped move heavy equipment. The proof showed that Petitioner hauled heavy equipment for his livelihood and that he received compensation for the equipment he moved in this case. Without the inherently unreliable hearsay admitted in this case, it is just as consistent with Petitioner's innocence as his guilt that he moved this heavy equipment for compensation. Only by considering the hearsay in determination of its admissibility was the hearsay admitted and only by its admission was Petitioner convicted.

2. Order Of Proof Allowed By Defective Rules Is Not Economical Or Reasonable

In *Vinson*, the Sixth Circuit allows the trial court to admit hearsay admissible only under this exception on the condition that the foundation for its admissibility later be established. As noted, there is a clear split among the circuits on this point; however, *Vinson* and its cohorts are unjustifiable in their risk of unfair convictions. If the trial court admits the hearsay conditioned upon establishment of the required foundation later, the trial court has only a Hobson's Choice when the foundation is not provided later — declare a mistrial or attempt to cure the error by instruction to the jury. An instruction to a jury to disregard testimony days or weeks after the testimony is given is fruitless and of extremely dubious quality. On the other hand, declaration of a mistrial for this reason is an outrageous and unreasonable waste of judicial resources when ordering of the proof could easily rectify the situation.

Any court that conditionally admitted such hearsay testimony would be constrained to admit the hearsay for all purposes when faced with the situation the trial court faced in this situation. After many witnesses and several weeks of trial, the trial court had to decide whether to admit the testimony, give the jury a useless instruction to disregard the testimony or declare a mistrial. Except in flagrant cases, the trial court's decision in this situation is all too predictable. The Fifth Circuit in *James* and the Tenth Circuit in *Stipe* recognize these problems and erect a preferential order of proof. These decisions provide a fair trial and conviction while *Vinson* does not.

ISSUE TWO

THE ACTUAL AND REVERSIBLE CONFLICT OF INTEREST OF TRIAL COUNSEL:

The Court should grant certiorari because the Sixth Circuit Court of Appeals has decided the federal issue of what constitutes an actual and reversible conflict of interest between a Defendant and his Attorney in a way that is in conflict with the decisions of this Court in *Wood* v. *Georgia,* 450 U.S. 261, 67 L.Ed.2d 220, 101 S.Ct. 1097 (1981); *Cuyler* v. *Sullivan,* 446 U.S. 335, 64 L.Ed.2d 233, 100 S.Ct. 1708 (1980), and *Holloway* v. *Arkansas,* 435 U.S. 475, 55 L.Ed.2d 426, 98 S.Ct. 1173 (1978).

In *Wood* v. *Georgia,* this Court vacated and remanded the decision of a state Court of Appeals. The record revealed that certain bookstore and theatre employees who were challenging a state court's revocation of their probation for failure to pay fines arising from obscenity convictions had been represented throughout the proceedings by legal counsel both hired by and paid for by their employer. This Court indicated that the possibility of a conflict of interest was sufficiently apparent at the time of the revoca-

tion hearing to impose a duty on the Trial Court to inquire further. The Trial Court was instructed that if there was an actual conflict of interest and no valid waiver of the right to independent counsel, then a new hearing must be held. In its ruling, this Court stated:

> "Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest." 450 U.S. at 271, 67 L.Ed.2d at 230.

At Footnote (18), the Court cited its previous decision in *Cuyler* v. *Sullivan* (supra) as "mandat[ing] reversal when the trial court has failed to make an inquiry even though it knows or reasonably should know that a particular conflict exists" 450 U.S. at 272, 67 L.Ed.2d at 231.

In *Cuyler* v. *Sullivan,* this Court had considered the question of habeas corpus relief for a state prisoner who alleged that his two defense lawyers, who also represented co-defendant, were subject to the potential conflict of interest arising from multiple representation. In that case, the record was silent, as neither the defendant or his attorneys brought up the question of a conflict of interest. While denying habeas corpus relief on the grounds that actual conflict of interest rather than possible conflict of interest must be shown, this Court stated that:

> "Defense counsel have an ethical obligation to avoid conflicting representations and to advise the Court promptly when a conflict of interest arises during the course of trial" 466 U.S. at 346, 64 L.Ed.2d at 345.

This finding was the basis for the further holding that, in state cases where neither the defense counsel or the defendant objects to multiple representations, the Court, unless it knows or reasonably should know that a particular conflict exists, can assume without further inquiry that the multiple representation entails no conflict or that the law-

yer and his clients knowingly accept such risk of conflict as may exist.

In *Holloway* v. *Arkansas,* (supra) this Court reversed the conviction of a defendant who had to share appointed counsel with two co-defendants. Before trial, that attorney had moved the court for appointment of separate counsel because of a risk of conflicting interests. It was held that, in the absence of any prospect of dilatory practices, the Trial Court's failure to either appoint separate counsel or to take adequate steps to ascertain whether the risk of conflict was too remote to warrant separate counsel deprived the Co-Defendants of the guarantee of assistance of counsel under the Sixth Amendment. This Court stated:

> "Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing. For example, in this case it may well have precluded defense counsel . . . from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution, provided a lesser charge or a favorable sentencing recommendation would be acceptable . . . examples can be readily multiplied. The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters." 435 U.S. at 490, 55 L.Ed.2d at 438.

The present Petitioner's case, because of the remand for further proceedings at which the Defendant, his former attorneys and the Prosecutor all testified, presents a clear record for determination of whether or not an "actual conflict of interest" requiring reversal existed between Knight and his attorneys. The District Court has made a finding of fact that, at the same time the Petitioner was on trial, his attorneys were also using their position as his legal counsel to advise him to take the Fifth Amendment and thereby

prevent him from revealing acts of wrongdoing he had witnessed them committing, which acts were then under active investigation by the Federal Government. Moreover, the Assistant United States Attorney prosecuting the Petitioner at his trial was the same Prosecutor whose property had been diverted and who had initiated the investigation of the Defendant's attorneys.

The situation, as outlined by the District Court's findings, presented this Petitioner's attorneys with conflicting interests in making the following decisions during his trial:

> (1) Do they inform the Trial Court of the specifics of their conflict when to do so would constitute an admission of their own wrongdoing possibly subjecting them to indictment, criminal contempt or loss of their licenses to practice law? The record reveals that Knight's attorneys remained silent, even when the matter was brought up during trial.
>
> (2) Do they advise their client of the specifics of their conflict and his right to ask the Court for independent counsel when to do so could free him from their control which they were using to prevent his revelation of their misconduct? The record reveals that Knight's attorneys never discussed their conflict of interest or the right to independent counsel with their client.
>
> (3) Do they advise their client to assist the United States in the pending investigation by giving them information he had or do they seek to negotiate on his behalf for immunity, sentence concessions, or favorable consideration at sentencing when to do so could result in the full disclosure of their own misconduct? The record reveals that Knight's attorneys advised their client to remain silent, by asserting his *Fifth Amendment* privilege, and never sought any benefit from the Government or the Court in return for his possible cooperation in the investigation.

(4) Do they advise Knight to testify in his own behalf at trial when this might be considered as a waiver of Fifth Amendment rights and his continued silence was protecting them in the ongoing investigation? The record reveals that Knight's attorneys advised their client not to take the stand in his own defense.

(5) Do they aggressively defend Knight when to do so might run the risk of antagonizing a Prosecutor who had the potential power to exercise his charging discretion in a manner having adverse and potentially fatal effects on their careers? The record reveals that Knight's attorneys put on no witnesses or evidence in his defense.

(6) Do they aggressively cross-examine James Durham, interview witnesses listed on the Government's trial outline, or strenuously seek acquittal when to do so might arm the Government with the argument that it was harmed by the attorneys' wrongful pretrial possession of Durham's Grand Jury Transcript and the Government's outline of proof? The record reveals that both Knight's attorneys subsequently argued at the contempt hearing (wherein the Trial Court received the Government's investigation report) that no harm had been done to the Government by their wrongful actions since the Petitioner and his Co-Defendants were ultimately convicted.

This Court has not defined the term "actual conflict of interest." However, the Fifth Circuit, in reversing a conviction where a defendant's attorney was simultaneously representing the Prosecutor in an unrelated civil action, defined it clearly and well:

> "An actual conflict of interest occurs when a defense lawyer places himself in a situation inherently conducive to divided loyalties. . . . If a defense attorney owes duties to a party whose interests are adverse to

those of the defendant, then an actual conflict exists." *Zuck* v. *State of Alabama,* (CA5, 1979) 588 F.2d 436 at 436. See also, *Castillo* v. *Estelle* (CA5, 1974) 504 F.2d 1243, (reversing a conviction where Defendant's attorney was also representing a Government witness in an unrelated case.)

In this Petitioner's case, his own attorneys were the parties whose interests were adverse to his own. Rose and Crabtree were in the untenable position of representing a client who was a potential government witness against them. The Sixth Circuit was clearly in error when it found no actual conflict of interest in such a situation. Both the Lower Courts and the attorneys who are its officers need further guidance from this Court as to appropriate procedure when a lawyer's own interests come into opposition with those of his client, including guidance as to when it is error for the trial court to fail to inquire further or obtain the defendant's waiver on the record.

CONCLUSION

The decision of the Sixth Circuit in this case and in *Vinson* regarding the necessary predicates for admissibility of evidence under *Fed. R. Evid. 801(d)(2)(E)* are at odds with the decisions of other Courts of Appeal and this Court's decision in *Glasser* v. *United States.* The passage of *Fed.R.Evid. 104* has caused the lower federal courts to struggle with the question of the continued validiy of *Glasser* and these courts need the guidance to be gained from a Supreme Court Opinion. Furthermore, the decision of the Sixth Circuit that the facts found by the District Court on remand did not demonstrate an "actual conflict of interest" between this Petitioner and his trial attorneys

at the time of his trial is at odds with this Court's decisions in *Wood* v. *Georgia; Cuyler* v. *Sullivan;* and *Holloway* v. *Arkansas.* Under the guidelines of *Rule 17* of the *Rules Of The Supreme Court,* both of these issues are important issues of federal law that merit review on Writ of Certiorari.

Respectfully Submitted,

COBB & OLDFIELD

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ATTORNEYS FOR
PETITIONER

EXHIBIT A

UNITED STATES DISTRICT COURT
for EASTERN DISTRICT OF KENTUCKY
LONDON

UNITED STATES OF AMERICA

vs.

JAMES KNIGHT

Defendant

Docket No. 78-37

JUDGMENT AND PROBATION/COMMITMENT ORDER

(Filed March 21, 1980)

In the presence of the attorney for the government the defendant appeared in person on March 19, 1980.

COUNSEL:

☒ WITH COUNSEL: W. L. Rose and Gary Crabtree.

PLEA:

• • •

FINDING & JUDGMENT:

There being a verdict of ☒ GUILTY. Cts. 1, 9, 10, 11, 12, 13, 14, 15, 16 & 17

Defendant has been convicted as charged of the offense (s) of Conspiracy, in violation of Title 18, Section 371, United States Code; Fraud by wire, radio or television in violation of Title 18, Section 1343, United States Code; and Interstate transportation of falsely made & forged security, goods, wares, merchandise or money, in violation of Title 18, Section 2314, United States Code.

SENTENCE OR PROBATION ORDER:

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Count 1 – FIVE (5) YEARS – FINE – $10,000.00.

It is ADJUDGED that the imposition of sentence in Cts. 9 through 17 is suspended and the defendant is placed on probation for a period of FIVE (5) YEARS to begin upon his release from custody after service of the sentence imposed in Ct. 1.

Imprisonment on above sentence is stayed for a period of 14 days and the defendant may report directly to the institution designated by the Bureau of Prisons. During the period of stay of 14 days the defendant shall advise the Probation Office in London, Kentucky by telephone as to his whereabouts. His travel is restricted to States of Tennessee and Kentucky.

IT IS FURTHER ADJUDGED that the Sentences on Cts. 9 through 17 shall be consecutive to that imposed in Ct. 1 although the sentences on Cts. 9 through 17 are not imposed at this time.

SPECIAL CONDITIONS OF PROBATION:

SPEC. COND. OF PROB: Defendant shall pay $10,000.00 fine within first four years of his period of probation supervision.

Presentence report submitted to the Court before im-

position of sentence & copies furnished to counsel pursuant to Rule 32, F.R.C.P.

ADDITIONAL CONDITIONS OF PROBATION:

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION:

The court orders commitment to the custody of the Attorney General and recommends, That the defendant be committed to a minimum security institution.

SIGNED BY:

☒ U.S. District Judge

/s/ EUGENE E. SILER, JR.
Judge

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

CRIMINAL No. 78-37
UNITED STATES OF AMERICA PLAINTIFF,

VS:

JAMES KNIGHT DEFENDANT.

MEMORANDUM

(Filed November 12, 1981)

This matter has come before the Court on remand from the United States Court of Appeals for the Sixth Circuit, with directions for this Court to determine whether an actual conflict of interest occurred at the trial between attorneys William L. Rose and Gary Crabtree and their client, James Knight, and, if so, whether there was any resulting prejudice because of it. After extensive hearings, this Court finds that there was no actual conflict of interest and, even if there were, no prejudice resulted as a consequence thereof.

Most of the factual background of this case is not disputed. James Knight consulted with and retained William L. Rose[1] as his attorney either before Knight was indicted

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[1] Attorney William L. Rose is an attorney with over 40 years of practice, including one six-year term as a Kentucky circuit judge and one six-year term as the Commonwealth's Attorney.

or at a time shortly thereafter, for Rose represented Knight at the time of arraignment. The fee in the case was $20,000.00, $3,000.00 of which was later paid to Gary Crabtree[2] upon his entry into the case as defense counsel for Knight. Knight also paid Crabtree an additional $2,000.00 from his own pocket.

The trial in this case against Knight and several other codefendants was to begin on January 21, 1980. During the week before, Assistant U.S. Attorney Robert Trevey had a trial outline which had been prepared in the U.S. Attorney's Office and a transcript of testimony by a key witness, James R. Durham. Trevey took this with him when he went to the Laurel County Jail to interview Durham and apparently left both documents at the jail in a public room. On January 17, 1980, Trevey discovered that the outline and the transcript were missing and checked with the Jailer, but could find no trace of it. He originally thought that perhaps he had left them in the Federal Building at London, but, upon reflecting about the matter later, he felt that perhaps he had left these documents at the jail while he interviewed Durham. Because it was a matter involving a grand jury transcript, Trevely reported the matter to the Court either shortly before or shortly after the jury selection began, just as a matter of information that the transcript had disappeared.

Jury selection took place on January 21, 1980, with the trial to begin on January 28, 1980.

On the following date, January 22, 1980, when Deputy U.S. Marshals happened to be by the home of the defendant Eugene Alley, they saw what appeared to be a grand

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[2] Attorney Gary Crabtree is also a highly experienced attorney with more than ten years of practice, including many major criminal cases in this Court.

jury transcript and reported this to Mr. Trevey. Trevey then went to the Alley home and found copies of his transcript and had arrest warrants issued by the Magistrate on January 23, 1980, against Mr. Alley and his wife for theft of government property.

The transcript and outline were apparently picked up at the jail by Attorney Crabtree when he was there seeing about another matter. When he spied these documents, he picked them up and showed them to Mr. Rose at a time before the trial. At that time, Crabtree had not been retained in the case, but he was retained shortly thereafter, because Attorney Rose felt that there was a need to have local counsel with office facilities and with a lot of experience in Federal Court. The transcripts were passed around through several hands after Mr. Crabtree got them, but apparently Attorney Rose did nothing more than look at the materials and give them to Attorney Fowler, representing Wayne Drewry, a codefendant.

On January 21, 1980, while Fowler had the document in his possession, he, Drewry and Knight were on their way home from court and stopped by Alley's office at Corbin. Alley there said he had some materials from depositions in civil cases involving the witness Durham and traded those materials for the copy of the grand jury transcript. It is unknown as to what ever happened to the trial outline.

On the night that Alley was arrested for possession of these papers, Rose called Knight and said that the papers should be done away with, because they could all get into trouble. Rose asked to speak with Fowler and after he did, Fowler told Drewry and Knight that the papers that they got would have to be destroyed. Fowler did destroy the papers that he had, perhaps the trial outline, and neither defense counsel nor the defendants at this point

apparently had any of the documents, for the copy of the grand jury transcript was seized from Alley.

Later, Mr. Rose told the rest of them that the material was a grand jury transcript and that they could all get charged with it and that the attorneys might lose their licenses.

On the day that the trial was to begin, January 28, 1980, the codefendants learned that Alley had been charged with the receipt of stolen government property. In the meantime, the U.S. Attorney was pursuing the investigation and turned the investigation of the disappearance of the documents over to Assistant U.S. Attorney Robert Houlihan, Jr., who was not involved in anyway in the case. The U.S. Attorney's office questioned the attorneys in the case, including Mr. Rose, all of whom initially denied having known anything about the transcript or the outline. Rose advised Knight to take the Fifth Amendment if asked anything about it.

At the time the trial began, on January 28, 1980, the Court was aware of the fact that a warrant had been issued and Alley had been arrested on the charge of the receipt of this stolen transcript and that the U.S. Attorney's office was questioning the attorneys in the case. The Court decided to proceed to trial on the indictment and to let the other matter involving the transcript be put aside until after the trial was completed. The case was over and the jury returned verdicts of guilty against each of the defendants on many of the counts on March 5, 1980. At that time, the Court asked the U.S. Attorney's office to make an investigation and file a report with the Court to see if there were any grounds for determination if there was any theft of government property or any potential contempt of court. Thereafter, interviews were held again with some of the attorneys, and Attorneys Rose and Crabtree then admitted how they obtained the documents.

A report involving all these interviews was turned over by Mr. Houlihan at the time of sentencing of the defendants in the case. At that time, Mr. Rose had the assistance of Attorney Lowell Lundy and Mr. Crabtree also had the assistance of Attorney Lundy and Attorney Larry Bryson. The Court took under advisement the question of whether there were any grounds to issue a show cause order and hold a contempt hearing. Later, an opinion was issued, determining there were no grounds for contempt or for further charges, and the matters against Alley and his wife were later dropped by the United States Attorney.

The issue involving the missing transcript and trial outline was not pursued during the time of the trial itself. However, the matter of the transcript was discussed several times between Knight and his attorney. Rose told Knight that he was going to meet with Trevey to straighten the matter out. Knight felt that Rose was very irritable with him during the trial and would not speak with him on occasions. However, Knight had no problems communicating with Crabtree at any time while the case was proceeding.

Knight did not take the stand in his own defense. This was the result of several conferences between Knight and his attorneys, who felt that it was best for him to rely upon testimony of Drewry and others. Knight was not the only defendant who did not testify.

Knight has very little education, and cannot read or write at a competent level. However, he has had several experiences in court before this one, including two felony convictions and another occasion when he testified as a witness in a homicide case. There is no evidence which Knight could have produced that was not introduced on his behalf in the trial. However, after the trial was over,

Rose and Crabtree advised Knight that they did not want to take the appeal, so Knight employed his present counsel, Honorable Robert Lotz, who had a potential conflict of interest, inasmuch as his law partner, William Oldfield, represented a codefendant, Robert Taylor, at trial, and another law partner, James Cobb, represented Alley at trial for awhile until he was fired in the middle of the trial. However, at the hearing, Mr. Knight waived any claims of conflict of interest between Lotz and Oldfield or Cobb. After the investigation involving the transcript had begun, at no time did either Rose or Crabtree tell Knight that he might want to get other counsel, nor did they offer Knight's information to the United States Attorney for a reduced charge on the indictment.

The claimed conflict here is that Mr. Rose and Mr. Crabtree were concerned about being charged themselves with contempt or the possession of stolen government property, so they were looking out for themselves. Even at the time of sentencing, for instance, the defendant Knight asserts that Rose and Crabtree felt that they might be inhibited in representing defendants in other matters in the Court before the contempt action was determined by the Court. Moreover, Knight claims that as he knew Crabtree and Rose got the transcript, he had something to offer in a "deal" with the United States Attorney, so Rose and Crabtree should have conveyed this to Mr. Trevey. Their failure to do so, says Knight, demonstrates an actual conflict of interest.

However, this does not produce an actual conflict. Admittedly, Mr. Rose and Mr. Crabtree were concerned about the other matter, but it appeared not to have affected their ability to represent Knight at any stage of the proceeding. The matter had to be passed by the Court, for under Rule 42, Federal Rules of Criminal Procedure,

summary disposition could not have been taken, inasmuch as the contempt was not done in the actual presence of the Court. Thus, any contempt proceeding had to be done upon notice under Rule 42(b), and was passed until the end of the trial, in order to expedite the trial itself. This is no different from any other case in which an attorney might commit some act which would be indirect contempt and could be raised at a time subsequent to the trial, nor is it any different from contempous conduct by the attorney himself in the presence of the Court, to be considered at the time of the conduct or after the trial is over.

Moreover, the failure of the attorneys to communicate an alleged "deal" with the U.S. Attorney was of little consequence. The prosecutor would have wanted all the facts, and he would have discovered that neither theft nor contempt was involved, thus demonstrating that Knight's information was of little value. In any event, the prosecutor could have gone ahead against Knight under the indictment, which was done, and then sought immunity regarding the transcript without giving up anything. All of this, of course, is pure speculation, but, if a new trial is granted for Knight, he clearly would not have anything to "deal" with at this stage of the proceedings.

The standard set out in this case by the Sixth Circuit is from *Wood* v. *Georgia,* 67 L.Ed.2d 221, 49 U.S.L.W. 4218 (1981), where the Court remanded the matter for a hearing on whether the conflict existed. In that case, the Court did not ask for a determination of any prejudice. In this case it did, perhaps following the language from other cases, such as *United States* v. *LaRiche,* 549 F.2d 1088 (6th Cir.) *cert. denied,* 430 U.S. 987 (1977). In that case, the Court held that the defendant must suffer actual prejudice in order to overturn a conviction. *Id.* at 1095. Neverthe-

less, it is not for this Court to determine the standard, but merely to make the findings as directed by the Sixth Circuit.

Therefore, the Clerk of this Court will transmit this Memorandum, along with the remainder of the file, back to the Sixth Circuit for further consideration of this case in line with the findings.

This 12 day of November, 1981.

/s/ EUGENE E. SILER, JR., Judge

EXHIBIT C

No. 80-5117
No. 80-5118
No. 80-5119

UNITED STATES COURT OF APPEALS

For The Sixth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ROBERT "BOBBY" TAYLOR (80-5117),
JAMES KNIGHT (80-5118),
WAYNE DREWRY (80-5119),
Defendants-Appellants.

APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed August 12, 1981

Before: EDWARDS, Chief Judge; LIVELY, Circuit Judge; and WISEMAN,* District Judge.

PER CURIAM. The defendants appeal from their jury convictions for conspiracy, fraud and interstate transportation of stolen property. The jury found that the defendants carried forward a conspiracy to defraud finance and leasing companies by four similar fraudulent schemes.

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* The Honorable Thomas A. Wiseman, Judge, U.S. District Court for the Middle District of Tennessee, sitting by designation.

The case for the government was based largely on the testimony of two of the alleged conspirators, one of whom testified under a grant of immunity, and the other under a plea bargain by which the United States dropped all but one charge against him. Only one defendant-appellant, Wayne Drewry, challenges the sufficiency of the evidence. The court has examined the record and has determined that the evidence was sufficient to support a jury conviction of Drewry.

All defendants contend that the district court erred in admitting hearsay testimony of Durham under the co-conspirator exception to the hearsay rule. This argument boils down to a request that this court reverse its decision in *United States* v. *Vinson,* 606 F.2d 149 (6th Cir. 1979), *cert. denied,* 444 U.S. 1074 (1980). This court adheres to its decision in *United States* v. *Vinson* and holds that the district court did not err in the admission of Durham's testimony.

The defendants-appellants also contend that the district court erred in limiting cross-examination of Durham concerning similar past activities in which he engaged. The district court considered the objections to the limitation of cross-examination and concluded that the particular questions were inadmissible under Rule 608 of the Federal Rules of Evidence. The government points out that the jury already knew of Durham's prior conviction and knew that he was a prime mover in the illegal activities which were the subject of the trial and argues there was no abuse of discretion in holding that the particular evidence sought on cross-examination was inadmissible. In view of the extensive knowledge which the jury had about the witness' past activities, we find no abuse of discretion or prejudice to the defendants in the rulings complained of.

The defendants-appellants also contend that the district

court erred in its instructions on conspiracy. The court has examined the instructions and finds them to be correct.

The defendant Knight asserts that the record discloses a conflict of interest between him and his attorneys. The record does disclose that documents pertaining to this trial were taken from the United States Attorney's office prior to the trial and that an investigation of this disappearance was underway when the trial began. Among those questioned were the two attorneys who represented Knight. On appeal it is argued that these attorneys were aware that they were under investigation and were probably suspected of having had the purloined documents in their possession at some time prior to the beginning of the trial. Knowing this, appellate counsel argues, these attorneys may have pressed the defense of Knight's claim with less vigor than they would have if these circumstances had not existed. They point to the fact that Knight neither took the stand nor offered any evidence at the trial.

The recent Supreme Court decision in *Wood* v. *Georgia*, — U.S. —, 101 S. Ct. 1097, 1104 (1981), indicates that where a possibility of a conflict of interest on the part of counsel in a criminal case is sufficiently shown, a duty is imposed upon a trial court to inquire further. We believe there has been a sufficient showing of the possibility of a conflict in the present case to require such further injury.

We find no merit in any of the claims of error made on behalf of the defendants Taylor and Drewry and none in any other claim of error on behalf of the defendant Knight. Accordingly, the convictions of Taylor and Drewry are affirmed. We remand the appeal of Knight to the district court for the inquiry required by *Wood* v. *Georgia*. The district court will determine whether any actual conflict of interest existed and, if so, whether Knight was prejudiced thereby. The district court will transmit

a supplemental record to this court following conclusion of the proceedings on remand. Jurisdiction is retained to consider this issue further when the supplemental record is received.

EXHIBIT D

No. 80-5118

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JAMES KNIGHT, *Defendant-Appellant.*	APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed June 22, 1982

Before: EDWARDS, Chief Judge; LIVELY, Circuit Judge; and WISEMAN,* District Judge.

PER CURIAM. Upon the original appeal by Knight from his conviction for conspiracy, fraud and interstate trans-

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* The Honorable Thomas A. Wiseman, Judge, U.S. District Court for the Middle District of Tennessee, sitting by designation.

portation of stolen property, this court concluded there had been a sufficient showing of a conflict of interest on the part of Knight's trial counsel to require further inquiry. Following the procedure which the Supreme Court resorted to in *Wood* v. *Georgia*, 450 U.S. 261 (1981), we remanded Knight's case to the district court for a determination of whether any actual conflict existed and, if so, whether Knight was prejudiced thereby. *United States* v. *Taylor, et al.*, 80-5117-5119 (unpublished per curiam opinion filed August 12, 1981).

Following remand the district court held an evidentiary hearing at which Knight testified. Both of the attorneys who represented Knight during the criminal trial testified, as did the assistant United States attorney who represented the government throughout the trial. In addition, another assistant United States attorney who had investigated an allegation that copies of documents related to the trial had been stolen, was a witness at the hearing. Following this hearing the district court entered a memorandum in which he summarized the evidence concerning the missing documents. The district court concluded that neither of Knight's attorneys was involved in a theft of the documents and neither was in contempt of court because of any contact he may have had with the documents.

The district court concluded that there was no actual conflict between the two attorneys and their client James Knight, and that even if a conflict existed, no prejudice to Knight resulted therefrom. The court specifically found that the conduct of Knight's trial by his attorneys was unaffected by the knowledge that they, along with others, were under investigation in relation to the missing documents.

Upon review of the supplemental record and briefs of the parties, we find no error in the district court's deter-

mination. In *Cuyler* v. *Sullivan*, 446 U.S. 335, 350 (1980), the Supreme Court stated the test for finding a Sixth Amendment violation on the basis of an attorney's conflict of interest:

> We hold that the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance.

The district court applied this test and found that the circumstances upon which the claim of a conflict was based did not affect the performance of the attorneys at the trial.

The judgment of conviction is affirmed.

EXHIBIT E

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

[WITNESS: JAMES RANDALL DURHAM]

[53] Q. Was Mr. Alley present when you talked with Tony Lannum?

A. One time, I think.

Q. And did he at that time advise you that Padco was for sale?

A. He did.

Q. Did he tell you who the owners of Padco were?

A. He did.

Q. Who was that?

A. Mr. and Mrs. Aubrey Chesnut.

Q. What did he do after he learned who the owners of the company were?

A. He went and tried to purchase that company.

Q. Who did he talk with?

A. Mrs. Chesnut.

Q. After talking with her, did he later enter into any kind of a contract for a bill of sale?

A. I did.

MR. TREVEY: Your Honor, at this time, I would request the Marshal to give to defense counsel for inspection what has been premarked for identification purposes as Exhibit Number 2 and hand it to the witness.

[54] (Government's Exhibit 2, a bill of sale for equipment from Padco to Consolidated Coal Company, was shown to counsel.)

MR. ROSE: Your Honor, may we approach the bench?

THE COURT: All right.

(At the bench.)

MR. ROSE: Your Honor, it has been stated by this witness that at this point in time only he and Mr. Alley were engaged in a conspiracy of the buying and selling of Padco. Therefore, your Honor, we would respectfully object, or I guess my best shot is to task for an admonition so stating to the jury that these things that are done with Padco are not in furtherance of the– at this point, not in furtherance of the conspiracy as far as James Knight is concerned.

MR. TREVEY: I don't think that the jury should be admonished at this time. There has been no testimony as to whether James Knight is concerned. And until such time as he should come up and the Court make a finding that he is included in the conspiracy, I don't see how it is prejudicial to Knight in any way thus far. We have got to build a house one brick at a time.

MR. ROSE: Your Honor, he says– I mean Mr. Durham has now said when they asked who was there, Mr. Alley and me. Anybody else? And the answer was, No, sir, If I didn't make a mistake in writing that down. Now, this action to Padco is [55] between Gene Alley and him and Mr. and Mrs. Chesnut, he testifies. Now, he said some other one by the name of Tony Lannum. We must object to any part and request an admonition as to the other defendants other than those, since it does not appear to be in furtherance of the conspiracy. That is my opinion.

THE COURT: Well, the Court of Appeals in the Enwright Case and the–

MR. TREVEY: Thompson.

THE COURT: Thompson, I was going to say Vinson.

MR. TREVEY: Vinson and Thompson.

THE COURT: Has suggested that the jury not be admonished where we have statement made in furtherance of a conspiracy, that is alleged to be in furtherance of a conspiracy, but to wait until later and make a finding because otherwise these admonitions are confusing to the jury. And what you tell them is these statements are not admissible against those who weren't there unless you later find that there was a conspiracy with those defendants who weren't there and there was a conspiracy, then at a later time you can relate it back to them. That's too confusing so we will let it in on the condition that it was during the furtherance of the conspiracy, during the time of the conspiracy and in furtherance of the conspiracy. And if any person joins the conspiracy at a later time they are bound by the acts [56] and declarations of the conspirators at the outset.

MR. OLDFIELD: Your Honor, I think it's the *US versus James,* Fifth Circuit Case, which requires the United States to produce the proof and, Number 1, establish the

existence of the conspiracy prior to the time that they admit the hearsay. It's going to be a real problem. We are going to have a lot of conversations come in here before we have any conspiracy established.

THE COURT: I think the Sixth Circuit rejected that method in one of these cases, whether it is *Thompson* or *Vinson*.

MR. TREVEY: That's the same case.

THE COURT: O.K. I will overrule that. And I will let the US proceed.

MR. ROSE: All right. Now, I don't want to, your Honor, I don't want to interrupt the Court in any way along this same line. I would like— I guess then—

THE COURT: You want a continuing objection?

MR. ROSE: And then I will just wait. I want a continuing objection and then I will wait and move for an admonition, I guess later.

THE COURT: All right. You may have a continuing objection to any statement made out of the presence of your client by some other—

MR. OLDFIELD: Also, your Honor, I would like the same objection.

[57] THE COURT: That will apply for all defendants.

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ALEXANDER L. STEVAS,
CLERK

No. 82-317

In the Supreme Court of the United States

OCTOBER TERM, 1982

JAMES KNIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly admitted co-conspirator statements into evidence at petitioner's trial.

2. Whether both courts below properly concluded that petitioner's trial counsel did not suffer from a conflict of interest that adversely affected their representation of petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-317

JAMES KNIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. 12a-15a) and opinion of the court of appeals following remand for an evidentiary hearing (Pet. App. 15a-17a) are not reported. The memorandum opinion of the district court (Pet. App. 4a-11a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1982. The petition for a writ of certiorari was filed on August 20, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted on three counts of wire fraud (18 U.S.C. 1343), four counts of transporting in interstate commerce goods taken by

fraud (18 U.S.C. 2314), two counts of inducing persons to travel in interstate commerce in order to defraud them (18 U.S.C. 2314), and one count of conspiracy to commit these offenses (18 U.S.C. 371).[1] He was sentenced to five years' imprisonment and was fined $10,000. The court of appeals affirmed (Pet. App. 1a-2a, 12a-17a).

1. The evidence at trial, the sufficiency of which is not challenged here, showed that petitioner, along with co-defendants Eugene Alley, Robert Taylor, and Wayne Drewry, and co-conspirators Vernon Mahana and J.R. Durham, conspired in 1977 to defraud several lessors and mortgagors of heavy equipment. They did so either by purchasing companies that possessed such leased or mortgaged equipment or by purchasing the equipment itself; they then resold the equipment in an attempt to defeat the mortgagors' or lessors' interests.

In January 1977, Alley and Durham discussed a scheme in which they would buy mining companies and dispose of their equipment, thereby defrauding the creditors of the equipment. They began with the Padco Coal Company in Barbourville, Kentucky (C.A. App. 44-45, 47).[2] In February 1977, using money furnished by Alley, Durham purchased two pieces of Padco's equipment for $10,000 and agreed to assume Padco's debts on the equipment (*id.* at 48, 52-54, 59, 178-181, 245-246). After co-defendant Taylor

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[1]Petitioner was acquitted on one count of mail fraud, one count of wire fraud, two counts of inducing persons to travel in interstate commerce in order to defraud them, and one count of transporting goods taken by fraud. Three co-defendants stood trial with petitioner. Wayne Drewry was convicted on the same counts as petitioner; Robert Taylor was convicted on those counts plus an additional wire fraud count. Their convictions were affirmed with petitioner's. A third co-defendant, Eugene Alley, was convicted on all counts of the indictment and did not appeal his conviction.

[2]"C.A. App." refers to the appendix filed in the court of appeals.

removed the equipment from the Padco site to Alley's lot, Durham transferred title to a bulldozer to Alley's corporation. That bulldozer was encumbered by a security agreement with Westinghouse Credit Corporation (*id.* at 55, 58, 181, 246, 252-256). Alley then sold the bulldozer to an auctioneer in Knoxville, Tennessee (*id.* at 259-260). Durham and Taylor sold the second piece of Padco equipment, which likewise was subject to a security agreement, to another coal company for $39,000 (*id.* at 57-58, 60). Durham ultimately realized $30,000 from these two sales, and Taylor and Alley realized $4,000 and $5,000, respectively (*id.* at 61, 229-232).[3]

On April 20, 1977, Vernon Mahana purchased the stock of High Carbon Coal, located in Elliott County, Kentucky (C.A. App. 367-368). Five days earlier, however, Mahana had sold two bulldozers owned by High Carbon to Alley, who immediately sold them for $120,000 (*id.* at 295-300, 304). Using that money, Mahana paid $75,000 on April 20 to the owner of High Carbon and $15,000 to that company's mortgager in order to give the appearance of a good faith purchase (*id.* at 103, 367-368, 370-371). That transaction was completed at 4:00 p.m.; by that evening, the conspirators removed High Carbon's heavy equipment (*id.* at 371-373). Taylor and Durham removed some equipment—in addition to the two bulldozers already sold—and Drewry repaired a bridge that was damaged in the process (*id.* at 446-447). Taylor, Alley, and Mahana ultimately sold four pieces of High Carbon equipment to various buyers (*id.* at 303-307, 348-349, 369, 382-385, 388-389, 392-397).

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[3]Durham later sold his corporation to a fictitious corporation so that he could escape liability for Padco's debts on the equipment (C.A. App. 64-66).

The final aspect of the scheme focused on the J & S Coal Company. Mahana, at the behest of Alley, Taylor, and Drewry, purchased the company, using a phony corporation as a front (C.A. App. 400, 455, 457, 479). Alley furnished more than $50,000 used for the purchase (*id.* at 362, 406-407, 455-456, 458-461).[4] Petitioner received three of the four pieces of equipment that the conspirators secured from J. & S. Though Mahana executed a bill of sale purporting to sell the equipment to petitioner for $70,500, petitioner never paid anything for the goods (*id.* at 464-467).[5] Instead, petitioner paid $4,000 each to Mahana and Drewry for their roles in the scheme (*id.* at 462).

2. Prior to trial, the prosecutor discovered that a trial outline he had prepared, as well as a transcript of Durham's grand jury testimony, both of which he apparently had left at a local jail after an interview with Durham, were missing (Pet. App. 5a). The day after the jury was selected, but almost a week before trial was to begin, the transcript was discovered at the home of co-defendant Alley. Alley and his wife were then charged with theft of government property (*id.* at 5a-6a). The government also questioned defense counsel, all of whom denied any knowledge of the transcript (*id.* at 7a). After the jury returned its verdict, the court asked the government to investigate the matter further (*ibid.*). Several counsel, including petitioner's attorneys, then admitted that they had seen the documents. Some time after petitioner was sentenced, the district court concluded that

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[4]Mahana also testified that petitioner's interest in an automobile speedway in Corbin, Kentucky, was involved in the J & S purchase (see C.A. App. 452, 480-481).

[5]A Westinghouse Credit Corporation employee later saw one piece of equipment at petitioner's speedway. He placed a tag on it to reflect Westinghouse's ownership interest and directed that the equipment not be moved. When he returned, however, the piece of machinery was gone (C.A. App. 412-415, 424-425).

there were no grounds for contempt citations or other charges. The government also dropped the theft charges against Alley and his wife (*id.* at 7a-8a).

3. On appeal, the court of appeals rejected several of petitioner's claims, including his contention that Durham's testimony was erroneously admitted under the co-conspirator exception to the hearsay rule (Pet. App. 12a-14a). The court of appeals remanded for further inquiry, however, concerning petitioner's claim that his attorneys had a conflict of interest at trial because they were aware that they were under investigation in connection with the missing government documents (*id.* at 14a-15a).

On remand, the district court conducted an extensive hearing on the allegation of a conflict of interest. Following the hearing, the district court found that petitioner's attorneys had no conflict of interest at trial, but that, even if they did, their performance was not adversely affected as a result. Although the court concluded that counsel were aware of the investigation of the missing transcript, in the court's view their predicament was no different from that facing any attorney who committed a possibly contemptuous act and awaited its final determination at the close of trial (Pet. App. at 9a-10a). The district court also concluded that petitioner's attorneys were not inhibited in their representation of petitioner (*id.* at 9a). On appeal after this remand, the court of appeals affirmed petitioner's conviction, finding that there was no conflict of interest that affected his attorneys' performance at trial (*id.* at 16a-17a).

ARGUMENT

1. Petitioner contends (Pet. 6-10) that the court below erred in approving the method employed by the district court in admitting into evidence various co-conspirators' statements. This Court denied the petition for a writ of certiorari filed by petitioner's co-defendant, Robert Taylor,

seeking review of the court of appeals' decision on this same ground, *Taylor* v. *United States*, cert. denied, 454 U.S. 1086 (1981), and petitioner has offered no reason why certiorari nevertheless should be granted on that issue here. In any event, his claims are without merit.

a. Petitioner contends (Pet. 7, 8-9) that review is warranted in this case on the question whether hearsay statements themselves may be considered in determining a defendant's participation in the charged conspiracy. Whatever the merits of that issue in other settings, however, it is clear that petitioner's connection to the conspiracy in this case was based on evidence independent of any co-conspirator's hearsay statements. As petitioner admits (*id.* at 4), his participation in the conspiracy was shown by the fact that he received three pieces of heavy equipment from the J & S Coal Company transaction and that he paid Mahana and Drewry for their assistance in obtaining the equipment (see C.A. App. 462, 464-467). Nor did the district court state that it was relying on the hearsay statements themselves in finding the statements admissible (*id.* at 482-483). Under these circumstances, it is unnecessary to consider petitioner's claim of conflict in the circuits on the question of the consideration of the statements themselves.

b. Petitioner also argues that the decision below conflicts with those of the Fifth and Tenth Circuits that, he contends, require the government to prove the existence of a conspiracy prior to the introduction of co-conspirator statements. But those decisions (*United States* v. *James*, 590 F. 2d 575 (5th Cir) (en banc), cert. denied, 442 U.S. 917 (1979); and *United States* v. *Stipe*, 653 F. 2d 446 (10th Cir. 1981)) do not forbid the alternate order of proof allowed by the district court here. In fact, in *James*, while stating that the preferred order of proof was for the existence of the conspiracy and the defendant's participation in it to be established

by independent evidence first, the court specifically stated that the order of proof in a conspiracy case is ultimately for the trial court to determine. 590 F. 2d at 582. Moreover, failure to follow the preferred order of proof is not a basis for reversal under *James* if the existence of the conspiracy and the defendant's participation in it are proven by a preponderance of the evidence before the close of trial. See *United States* v. *Whitley*, 670 F. 2d 617, 620 (5th Cir. 1982); *United States* v. *Ricks*, 639 F. 2d 1305, 1310 (5th Cir. 1981).

The Tenth Circuit in *Stipe* merely reiterated *James*' preference that independent evidence of the conspiracy and a defendant's participation in it be introduced prior to the co-conspirator's statements. 653 F. 2d at 449. That opinion does not, however, foreclose a trial court from exercising its discretion in appropriate cases to allow the order of proof utilized here (see *United States* v. *Radeker*, 664 F. 2d 242, 244 n.3 (10th Cir. 1981)) or suggest that reversal of the conviction must follow if the trial court takes another approach.

By the same token, the Sixth Circuit has not adopted a contrary preference. In its opinion in *United States* v. *Vinson*, 606 F. 2d 149, 152-153 (1979), cert. denied, 444 U.S. 1074 (1980), the Sixth Circuit held that the district court may require proof by independent evidence first, may admit the hearsay subject to later connecting up, or may even hold a "mini-hearing" prior to trial on the question. This claim therefore does not warrant review.

2. Petitioner also argues (Pet. 10-15) that the courts below incorrectly determined that his attorneys did not have a conflict of interest at trial that interfered with their performance. Both courts below resolved this essentially factual claim against petitioner, however, and there is no need to review it further. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636 (1967).

In keeping with the requirements of *Wood* v. *Georgia*, 450 U.S. 261 (1981), and *Cuyler* v. *Sullivan*, 446 US. 335 (1980), the court of appeals remanded to the district court to conduct a hearing on petitioner's claim of conflict of interest (Pet. App. 14a-15a). The district court complied, holding an extensive hearing at which petitioner's trial counsel, the Assistant United States Attorney who prosecuted the case, and another Assistant United States Attorney who investigated the disappearance of the documents, all testified (*id.* at 16a). The district court then wrote a memorandum opinion in which it stated that it previously had determined that there were no grounds for contempt or other charges against the attorneys and that the criminal charges against co-defendant Alley in the matter had been dropped (*id.* at 8a). The district court also found that no actual conflict of interest resulted from the investigation and that, although petitioner's attorneys were concerned about the investigation, "it appeared not to have affected their ability to represent Knight at any stage of the proceeding" (*id.* at 9a). The court noted in this regard that "[t]here is no evidence which [petitioner] could have produced that was not introduced on his behalf in the trial" (*id.* at 8a). Finally, the district court found that its postponement of resolution of the matter until after trial was no different from any situation in which an attorney might engage in conduct that could give rise to a contempt citation at a later date but in which the court's resolution of the matter is put off until after trial (*id.* at 10a).

The court of appeals, after reviewing the record of the hearing on remand, likewise concluded that petitioner's attorneys suffered from no conflict of interest and that the performance of petitioner's attorneys was not in any event affected. Nothing more was required of the courts below in considering petitioner's claim, and further review by this Court accordingly is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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